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No. 04-1324

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF CERTAIN PROFESSORS OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Professors John H. Blume, Associate Professor of Law and Director of the Cornell Death Penalty Project, Cornell Law School; James S. Liebman, Simon H. Rifkin Professor of Law, Columbia University; and Randy Hertz, Professor of Clinical Law and Director of the Clinical and Advocacy Programs, New York University School of Law, respectfully move for leave to file the attached brief as *Amici Curiae* in support of Petitioner, Patrick Day. On March 30, 2005, a petition for a writ of certiorari was filed in *Day v. Crosby*. The consent of counsel for Petitioner has been obtained and is being filed with the Clerk by mail. The consent of counsel for Respondent was requested but refused.

Amici submit that it may be useful for this Court to consider their perspective on the issues raised by this case and therefore request permission to file the attached brief. *Amici* are law school professors who teach courses, conduct research, and publish articles and books on various topics related to federal habeas corpus, practice and procedure, and criminal justice.

Amici submit that this Court's review is warranted because of the importance of the issue presented by the case at bar: Whether, in a habeas corpus case, a court can raise the affirmative defense of the statute of limitations *sua sponte* after the state has filed an answer, especially where the state expressly concedes that the petition was timely. As set out in the attached *amici* brief, the importance of this issue is reflected not only by the clear circuit split, but also by the fact that this Court routinely grants review to resolve disagreements involving the statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (1996). For these reasons, *Amici* respectfully ask the Court to grant this motion and to permit the filing of the accompanying brief.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are law school professors John H. Blume, Associate Professor of Law and Director of the Cornell Death Penalty Project, Cornell Law School; James S. Liebman, Simon H. Rifkin Professor of Law, Columbia University; and Randy Hertz, Professor of Clinical Law and Director of the Clinical and Advocacy Programs, New York University School of Law. *Amici* teach courses, conduct research, and publish articles and books on various topics related to federal habeas corpus, practice and procedure, and criminal justice.[2] Since 1996, Professor Blume also has served as Counsel for the Habeas Assistance and Training Project, which consults with the Defender Services Committee of the Judicial Conference of the United States. Professor Liebman and Professor Hertz have co-authored the leading American

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[1] Pursuant to Rule 37.6, *Amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written by undersigned counsel. No person or entity other than *Amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] *See, e.g.*, John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. Rev. 271 (1996); John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After* Brecht v. Abrahamson, 35 Wm. & Mary L. Rev. 163 (1993); John H. Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465 (1999); Randy Hertz & Martin Guggenheim, *Reflections on Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials, in Symposium on Juvenile Justice Reform*, 33 Wake Forest L. Rev. 553 (1998); James Liebman, *A Rough Outline of the New Habeas and the New Section 2255* and *The New Habeas: The Standard for Adjudicating Legal Questions*, ALI-ABA Video L. Rev. (Sept. 12, 1996).

treatise on federal habeas corpus,[3] as well as a variety of other publications and studies on the death penalty.[4]

Amici file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Patrick Day's petition for a writ of certiorari. On November 29, 2004, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's decision that Mr. Day's petition for a writ of habeas corpus was untimely under 28 U.S.C. § 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (1996) ("AEDPA"). Although the state's answer to the habeas petition expressly conceded that the petition was timely filed, the district court nonetheless *sua sponte* raised the statute of limitations issue and dismissed the petition. In affirming, the Eleventh Circuit held that "[a] concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA." *Day v. Crosby*, 391 F.3d 1192, 1195 (11th Cir. 2004). The Eleventh Circuit further held that the failure to plead an affirmative defense in a habeas case does not constitute a waiver as it does in other civil cases. *Id.* at 1194.

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[3] *Federal Habeas Corpus Practice and Procedure* (Vols. 1 and 2) (all eds. (1st-4th) and all supps. (1989-2002)).

[4] *See, e.g.*, Randy Hertz & James S. Liebman, Brecht v. Abrahamson: *Harmful Error in Habeas Corpus Law*, 84 J. Crim. L. & Criminology 1109 (1994); James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000); James Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases and What Can Be Done About It* (Feb. 11, 2002); Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Cal. L. Rev. 317 (1981).

Mr. Day now seeks certiorari to resolve a split in the circuits regarding whether, in a habeas corpus case, a court can raise the affirmative defense of statute of limitations *sua sponte* after the state has filed an answer, especially where the state expressly concedes that the petition was timely. The importance of this issue is reflected not only by the clear circuit split,[5] but also by the fact that this Court routinely grants review to resolve disagreements involving AEDPA's statute of limitations.[6] *Amici* submit that certiorari should be granted in this case. Under the Federal Rules of Civil Procedure, the statute of limitations is an affirmative defense that is waived by the defending party if not asserted in a timely manner. Moreover, in civil cases, it is improper in most instances for a court to raise the affirmative defense of statute of limitations *sua sponte*. Rules of statutory construction support application of these principles to

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[5] *Compare Day*, 391 F.3d at 1195 (district court can raise AEDPA statute of limitations *sua sponte* after state's concession of timeliness); *Jackson v. Sec'y for the Dep't of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (district court can raise AEDPA statute of limitations *sua sponte*), *with Nardi v. Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004) (state waives its statute of limitations defense by filing a responsive pleading that fails to affirmatively set forth the defense); *Robinson v. Johnson*, 313 F.3d 128, 137 (3d Cir. 2002) (opinion on panel rehearing) (affirmative defenses such as statute of limitations "under the AEDPA should be treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter" or be deemed waived), *cert. denied*, 540 U.S. 826 (2003); *Scott v. Collins*, 286 F.3d 923, 928 (6th Cir. 2002) (state's failure to raise issue of timeliness resulted in waiver of requirement under AEDPA that petition be filed within reasonable time after effective date of AEDPA).

[6] *See, e.g., Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 824 (2005) (whether amendment of petition relates back to date of filing original petition); *Dodd v. United States*, 365 F.3d 1273 (11th Cir.), *cert. granted*, 125 S. Ct. 607 (2004) (when limitations period under 28 U.S.C. § 2255 begins to run); *Pace v. Vaughn*, No. 02-3049, 2003 WL 21754982 (3d Cir. July 30, 2003), *cert. granted sub nom. Pace v. DiGuglielmo*, 125 S. Ct. 26 (2004) (whether untimely state post-conviction petition may be "properly filed" under § 2244(d)(2)).

AEDPA. If Congress had intended to protect against waiver of the limitations defense under AEDPA, it could have explicitly so stated - as it did with respect to exhaustion.

Furthermore, contrary to the ruling below, Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Rule 4") does not authorize a departure from the manner in which a court treats the statute of limitations defense under the Federal Rules of Civil Procedure. Thus, after the court has required the state to answer the petition, the court no longer has the authority to dismiss *sua sponte*.

ARGUMENT

I. UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, A PARTY WAIVES A STATUTE OF LIMITATIONS DEFENSE BY FAILING TO PLEAD IT AND A COURT ERRS BY RAISING THE DEFENSE *SUA SPONTE*

Under Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure, a party responding to a claim must assert all affirmative defenses in its responsive pleading. Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* § 5.20 (1985) (defendant must plead affirmative defense in answer so that plaintiff is aware of the allegations and has an opportunity to prepare to meet them). Like all the defenses enumerated in Fed. R. Civ. P. 8(c), the statute of limitations defense is a non-jurisdictional affirmative defense. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *O'Neel v. Nat'l Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804, 807 (1982) ("We specifically renounce the contention that the defense of the statute of limitations goes to jurisdiction of the tribunal . . . ."). Generally, an affirmative defense that is not raised in the responsive pleading is waived. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 644 (3d ed. 2004) ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case . . . .").

These principles are a critical component of the adversary system, which requires the parties to a dispute, not the courts, to frame the issues to be litigated. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").[7] These principles are particularly applicable to statutes of limitations, which protect the defending party against stale claims and promote finality of cases in certain circumstances. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (statutes of limitations provide protection from stale claims).[8] Thus, the burden is properly placed on the defending party to assert a statute of limitations defense. *Id.* (statutes of limitations "put the adversary on notice to defend within a specified period of time"). Indeed, it is well settled under Fed. R. Civ. P. 8(c) that a statute of limitations defense is generally waived if it is not asserted in the responsive pleading. *See, e.g., Kropelnicki v. Siegel*, 290 F.3d 118, 130 n.7 (2d Cir. 2002) ("The statute of limitations is an affirmative defense that is waived if not

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[7] *See also Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125, 1130 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part) ("Under ordinary principles of the adversary system, we do not reach out to decide questions not before us."), *cert. denied*, 124 S. Ct. 2176 (2004).

[8] *See also McGraw v. Matthaei*, 388 F. Supp. 84, 88-89 (E.D. Mich. 1972) (untimely raising of statute of limitations not allowed when extensive trial preparation and discovery had already taken place).

raised."); *Day v. Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997) ("The statute of limitations is an affirmative defense which must be specifically pled .... [F]ailure to plead the bar of the statute of limitations constitutes a waiver of the defense.").[9]

Given these principles, a court should not correct a party's failure to plead an affirmative defense, such as the statute of limitations, by raising it *sua sponte*. Otherwise, there is no waiver at all. *See Smith v. Horn*, 120 F.3d 400, 409 (3d Cir. 1997) (raising affirmative defense *sua sponte* puts court in "untenable position of ferreting out possible defenses upon which the state has never sought to rely" and makes judges come "dangerously close to acting as advocates for the state rather than as impartial magistrates"); *Haskell v. Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since [the statute of limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*. Otherwise, the waiver aspect of Rule 8(c) would have little meaning." (citations omitted)).[10] *Amici* submit that the Court should grant certiorari to resolve the application of these well-settled principles to cases arising under AEDPA.

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[9] *See also Haskell v. Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) (failure to raise limitations defense in first responsive pleading constitutes waiver).

[10] *See also Hutcherson v. Lauderdale County, Tenn.*, 326 F.3d 747, 757 (6th Cir. 2003) ("Courts generally lack the ability to raise an affirmative defense sua sponte."); *Kropelnicki*, 290 F.3d at 130 n.7 ("[W]e have held that 'a district court "ordinarily" should not raise a statute of limitations defense *sua sponte*.'" (citation omitted)); *Hardiman v. Reynolds*, 971 F.2d 500, 502 (10th Cir. 1992) ("Generally, where the parties have not raised a defense, the court should not address the defense sua sponte.").

II. THE PRINCIPLES GOVERNING CONSIDERATION OF A LIMITATIONS DEFENSE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE APPLY TO HABEAS CORPUS CASES

Rule 81(a)(2) of the Federal Rules of Civil Procedure states:

> These rules are applicable to proceedings for ... habeas corpus ... to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

Similarly, Rule 11 of the Habeas Rules provides that "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." This Court has confirmed that habeas cases are civil proceedings generally governed by the Federal Rules of Civil Procedure. Indeed, just last Term in *Banks v. Dretke*, 540 U.S. 668, 704-05 (2004), this Court held that Fed. R. Civ. P. 15(b) applies in habeas cases. *See also Browder v. Director, Dep't of Corr.*, 434 U.S. 257, 269 (1978) (habeas is civil proceeding governed by Federal Rules of Civil Procedure). Lower courts concur. *See, e.g., Farmer v. Litscher*, 303 F.3d 840, 842-43 (7th Cir. 2002) (common understanding that habeas corpus cases are civil rather than criminal proceedings); *United States ex rel. Gaugler v. Brierley*, 477 F.2d 516, 523 (3d Cir. 1973) ("[F]ederal habeas corpus proceedings are *civil*, and not criminal, in nature. They are governed by the Federal Rules of Civil Procedure." (footnote omitted)). This Court has also recognized the importance of addressing the application of specific provisions of the Federal Rules of Civil

Procedure to habeas cases, ruling on or granting certiorari in a number of such cases.[11]

AEDPA contains a one-year statute of limitations.[12] Under the above provisions, the Federal Rules of Civil Procedure governing consideration of affirmative defenses such as limitations remain applicable in habeas corpus cases. As set forth below, four significant considerations lend support to this conclusion. First, given that AEDPA's statute of limitations is a departure from the common law, it should be read narrowly as an ordinary, waivable affirmative defense - not broadly as an unwaivable bar. In addition, the well-settled principle that an affirmative defense not raised is waived was not preempted by AEDPA's statute of limitations, nor does the statutory construction of AEDPA reveal any congressional intent to do so. Finally, Rule 4 does not provide any support for a court's *sua sponte* dismissal of a petition after a responsive pleading has already been ordered by that court.

[11] *See, e.g., Banks v. Dretke*, 540 U.S. 668 (2004) (Fed. R. Civ. P. 15(b) applies in habeas cases); *Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 824 (2005) (Fed. R. Civ. P. 15(c)'s application to habeas); *Thompson v. Bell*, 373 F.3d 688 (6th Cir. 2004), *cert. granted in part*, 125 S. Ct. 823 (2005) (application of Fed. R. App. P. 10(e) to habeas cases); *Gonzalez v. Sec'y for the Dep't of Corr.*, 366 F.3d 1253 (11th Cir. 2004), *cert. granted in part*, 73 U.S.L.W. 3410 (U.S. Jan. 14, 2005) (No. 04-6432) (Fed. R. Civ. P. 60(b)'s application to habeas). The application of Fed. R. Civ. P. 8(c) and its governing principles to habeas cases is of similar importance, particularly given the generally dispositive nature of statute of limitations defenses.

[12] AEDPA actually contains two different one-year statute of limitations provisions, one for persons in state custody (28 U.S.C. § 2244(d)(1)) and one for persons in federal custody (28 U.S.C. § 2255). The former provision is at issue here.

A. The Statute Of Limitations In AEDPA Must Be Read Narrowly Because It Is A Departure From Common Law

At common law, there was no statute of limitations applicable to habeas claims, a principle that was recognized by this Court. *United States v. Smith*, 331 U.S. 469, 475 (1947) ("*[H]abeas corpus* provides a remedy . . . without limit of time."); *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) ("Congress has yet to create a statute of limitations for federal habeas corpus actions.").[13] In 1996, however, AEDPA established for the first time a one-year statute of limitations for habeas petitions. *See Brown v. Angelone*, 150 F.3d 370, 371 (4th Cir. 1998). In the congressional debate over AEDPA's statute of limitations provision, Representative Pelosi noted the drastic impact of this significant departure from the common law: "For the first time, a use it or lose it approach is being applied to a basic constitutional right. Constitutional rights are not time-bound, they are timeless or they are worthless." 142 Cong. Rec. H3614 (daily ed. Apr. 18, 1996). Moreover, unlike other provisions of AEDPA, such as the successive-petition and evidentiary hearing provisions,[14] which were enacted after development of a consistent body of common law on the topic, the statute of limitations on habeas corpus petitions was a pure legislative creation - orphaned from any common law supporting a time limitation for habeas.

But that was as far as Congress went. As discussed in section II.C *infra*, there is no language in

[13] Although Rule 9(a) of the Habeas Rules had permitted a district court to dismiss a petition under certain circumstances if the state proved prejudice by delay in filing the petition, this Court found that a prisoner's six-year delay in filing a habeas petition did not violate Rule 9(a). *See Lonchar v. Thomas*, 517 U.S. 314, 326-28 (1996).

[14] 28 U.S.C. § 2244(b)(3)(A) and § 2254(e)(2), respectively.

AEDPA indicating that Congress also sought to depart from the common law rules treating the statute of limitations as a waivable, affirmative defense. As such, AEDPA's statute of limitations must be interpreted narrowly. *See* Norman J. Singer, *Statutes and Statutory Construction* § 50.01, at 140 (6th ed. rev. 2000) ("Absent an indication that the legislature intends a statute to supplant common law, the courts should not give it that effect." (footnote omitted)).

As this Court has recognized since 1879: "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. R.R. Co.*, 101 U.S. 557, 565 (1879). This Court has emphasized that "[i]t is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983) (citations omitted) (alterations in original).[15] Thus, an expansive interpretation of the AEDPA statute of limitations as an unwaivable defense simply is not warranted.

The importance of the writ of habeas corpus also counsels in favor of interpreting the statute of limitations narrowly. The right of habeas corpus, as a facet of American law, is as old as our Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or

[15] *See, e.g., Fleet Nat'l Bank v. Valente (In re Valente)*, 360 F.3d 256, 261 (1st Cir. 2004) ("[T]o find broad preemption in the UFTA, in the absence of language of preemption, would be at odds with the presumption that statutes should not be construed to alter common law principles absent an explicit statement of legislative intent to do so.").

Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The right to petition for a writ of habeas corpus has been a federal statutory right for nearly as long. *See* Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 81 (1845); 28 U.S.C. § 2254(a). Because of the significance of the writ, this Court has recognized the importance of allowing a defendant the opportunity for one round of federal review: "Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869) (the writ "has been for centuries esteemed the best and only sufficient defence of personal freedom")).

B. AEDPA Does Not Preempt Application Of Federal Rule Of Civil Procedure 8(c) And Its Principles To Habeas Corpus Cases

Nothing in AEDPA suggests that Congress intended to depart from the common law rule by creating an unwaivable statute of limitations bar. The lower courts are in agreement that AEDPA's statutory limitations period is an affirmative defense. *See Nardi v. Stewart*, 354 F.3d 1134, 1140 (9th Cir. 2004) ("There is no dispute that AEDPA's statute of limitations is an affirmative defense."); *Jackson v. Sec'y for the Dep't of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (same).[16] Neither AEDPA nor its legislative history addresses assertion and waiver of the defense, nor are there any provisions suggesting a different standard from that applicable to Fed. R. Civ. P. 8(c). Thus, in a habeas case, just as in an

[16] *See also Scott v. Collins*, 286 F.3d at 927 (same); *Carrington v. Robinson*, No. 99-CV-76377-DT, 2001 WL 558232, at *4 (E.D. Mich. Mar. 27, 2001) (same); *Acosta v. Artuz*, 221 F.3d 117, 121-22 (2d Cir. 2000) (same); *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) (same).

ordinary civil case, a responding party must assert a statute of limitations defense in its responsive pleading, and failure to do so results in a waiver. *See Nardi*, 354 F.3d at 1141 (state must raise statute of limitations defense in order to avoid waiver); *Robinson v. Johnson*, 313 F.3d 128, 137 (3d Cir. 2002) (affirmative defenses under AEDPA should be treated the same as in other civil cases), *cert. denied*, 540 U.S. 826 (2003); *Scott v. Collins*, 286 F.3d 923, 927-30 (6th Cir. 2002) (failure to plead statute of limitations defense in habeas case results in waiver).[17] As explained in *Pino v. United States*, No. 98 Civ. 0092(RCC), 2004 WL 1320888 (S.D.N.Y. June 14, 2004), "'[p]arties are generally required to assert affirmative defenses early in litigation, so they may be relied upon, prejudice may be avoided, and judicial resources may be conserved. Habeas proceedings are no exception.'" *Id.* at *2 (quoting *Robinson*, 313 F.3d at 134); *see, e.g., Green v. United States*, 260 F.3d 78, 85 (2d Cir. 2001) ("the government expressly waive[d] its [AEDPA] statute of limitations defense by advocating a remand and 'suggesting' the conditions for that remand").

In *Robinson*, the Third Circuit explained why AEDPA's statute of limitations is waivable: "[B]ecause the AEDPA limitations period is subject to equitable modifications such as tolling, it is also subject to other non-jurisdictional, equitable considerations, such as waiver." 313 F.3d at 134. The court went on to explain that "affirmative defenses under the AEDPA should be

[17] *See also Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (implying that government waiver is possible in finding that government did not waive its AEDPA statute of limitations defense); *Saucier v. Warden, N.H. State Prison*, 215 F.3d 1312 (table), No. 99-1345, 2000 WL 739713, at **1 (1st Cir. June 5, 2000) (unpublished) (same); *Samuel v. Duncan*, 92 F.3d 1194 (table), No. 95-56380, 1996 WL 413632, at **1 (9th Cir. July 22, 1996) (unpublished) (AEDPA statute of limitations defense can be waived); *Andrews v. Johnson*, 976 F. Supp. 527, 530 (N.D. Tex. 1997) (since statute of limitations in habeas is affirmative defense, it is waived if not pled).

treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter." *Id.* at 137. In so holding, the court reviewed several cases and concluded that the purpose of requiring parties to raise affirmative defenses early on was "not only to avoid prejudice, but also to promote judicial economy." *Id.*; *see also Grant v. Preferred Research, Inc.*, 885 F.2d 795, 797 (11th Cir. 1989) ("The Supreme Court has held that the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it."); *Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987) ("The statute of limitations is an affirmative defense under Fed. R. Civ. P. 8(c) that must be asserted in a party's responsive pleading 'at the earliest possible moment' and is a personal defense that is waived if not promptly pleaded." (citations omitted)). Therefore, AEDPA's statute of limitations, like any other affirmative defense, must be pled in the answer or at the earliest practicable moment thereafter. Otherwise, it is waived.

Furthermore, nothing in AEDPA overrides the corollary principle applied in civil cases that courts should not revive waived statute of limitations defenses by raising them *sua sponte*. Indeed, this Court has made clear that *sua sponte* rulings in habeas cases are disfavored. *See, e.g., Castro v. United States*, 540 U.S. 375, 377 (2003) (court may not recharacterize a motion for habeas relief without notifying the petitioner of its intent); *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (court of appeals may not recall mandate *sua sponte* unless it is to correct "a miscarriage of justice"). In this case, *sua sponte* dismissal on limitations grounds is particularly inappropriate given that the state not only failed to assert a statute of limitations defense, but affirmatively conceded the timeliness of the habeas petition. *See Scott v. Johnson*, 227 F.3d 260, 262-63 (5th Cir. 2000) (state's intentional waiver of procedural defense

serves as a consideration against *sua sponte* invocation of procedural bar).

C. The Statutory Construction Of AEDPA Supports Application Of Federal Rule Of Civil Procedure Principles To AEDPA Statute Of Limitations

If Congress intended to protect the state from waiving the statute of limitations defense in habeas cases, it would have expressly said so. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."). In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991), this Court, interpreting Congress' intent with respect to the Age Discrimination in Employment Act of 1967 ("ADEA"), stated: "'[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history'" (quoting *Mitsubishi*, 473 U.S. at 628) (alterations in original). Here, because neither the plain language of AEDPA nor its legislative history suggests an intent to protect against waiver of the statute of limitations, Congress is presumed not to have intended to provide such protection. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so. . . . The absence of this language in 28 U.S.C. § 1603(b) instructs us that Congress did not intend to disregard structural ownership rules."); *United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way.").

Moreover, in another section of the statute, Congress expressly protected the state against inadvertent waiver of another affirmative defense, exhaustion of state remedies. Section 2254(b)(3) provides that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, *expressly waives* the requirement." 28 U.S.C. § 2254(b)(3) (emphasis added). Thus, Congress clearly knew how to expressly alter the general rules of waiver to protect the state, and even did so with respect to another procedural defense in habeas cases. Under basic rules of statutory construction, Congress' explicit protection of the state from inadvertent waiver of the exhaustion requirement and its failure to similarly protect the state from waiver of the statute of limitations defense indicates that Congress did not intend to provide such protection. *See* Norman J. Singer, *Statutes and Statutory Construction* § 47.25, at 327 (6th ed. rev. 2000) ("There is generally an inference that omissions are intentional. This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else." (footnotes omitted)); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))); *accord Bates v. United States*, 522 U.S. 23, 29-30 (1997) (same).

There are many examples where this Court and lower courts have applied this negative inference in refusing to read language into a statute that is not provided explicitly. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452-53 (2002) ("Where Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act

that give the option of attaching liability to 'successors' and 'successors in interest.'"); *Lindh v. Murphy*, 521 U.S. 320, 330 (1997) ("The insertion of § 107(c) with its different treatments of the two chapters thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted."); *Welzel v. Advocate Realty Invs., LLC (In re Welzel)*, 275 F.3d 1308, 1314 (11th Cir. 2001) (Congress' use of word "reasonable" with respect to one set of items but not another indicates that Congress acted purposefully in deciding whether to include or exclude reasonableness standard); *Henderson v. Immigration & Naturalization Serv.*, 157 F.3d 106, 129-30 (2d Cir. 1998) ("Congress' use of explicitly retroactive language in that part of the bill [AEDPA § 413(g)], and its failure to employ any analogous language in the nearby and closely related § 440(d), by itself strongly indicates that Congress did not intend § 440(d) to apply retroactively."). Thus, the statutory construction of AEDPA supports application of Fed. R. Civ. P. 8(c) and its principles to AEDPA's statute of limitations.

D. Rule 4 Does Not Authorize A Court To Dismiss A Habeas Petition *Sua Sponte* After A Responsive Pleading Has Been Filed

The court of appeals based its conclusion that the statute of limitations was unwaivable on Rule 4, holding that a court may dismiss a petition *sua sponte* even after an answer has been filed. *Day*, 391 F.3d at 1194-95. Rule 4 provides in relevant part:

> If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court,

> the judge must dismiss the petition . . . . *If the petition is not dismissed*, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.[18]

Rule 4 (emphasis added). The most logical reading of Rule 4 is that a court may dismiss *sua sponte* a facially deficient habeas petition brought under § 2254 *prior* to a responsive pleading being filed, but not after. The language of Rule 4 is sequential and expressly allows a court to dismiss *sua sponte* a habeas petition prior to ordering a responsive pleading. There is nothing in the Rule, however, that authorizes a court to dismiss *sua sponte* after the court has ordered the responsive pleading. To read absent words into the Rule "would result 'not [in] a construction'" of the Rule, "'but, in effect, an enlargement of it by the court.'" *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004) (citation omitted). Thus, under the rules of statutory construction discussed above, Rule 4 should be interpreted as allowing only that which it expressly authorizes. *See United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897) (legislative intent is found in the legislature's chosen language; "[n]o mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute"); *see also Lamie*, 540 U.S. at 534 (when a statute's language is plain, it is the court's duty to "'enforce it

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[18] *Amici* cite to the current version of the Rule, which was amended effective December 1, 2004. Notably, Congress could have amended Rule 4 in order to clarify any intent to give district courts a continuing power to dismiss *sua sponte*. *See Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. . . . This [approach] allows both of our branches to adhere to our respected, and respective, constitutional roles.").

according to its terms'" (citations omitted)); *Lewis v. Barnhart*, 285 F.3d 1329, 1331-32 (11th Cir. 2002) ("'"[W]here the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said."'" (citations omitted)).[19]

The Advisory Committee Notes to Rule 4 support this interpretation, explaining that a district court is granted the initial power to dismiss *sua sponte* a facially deficient petition to "screen out frivolous petitions and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." *See* Rule 4 advisory committee's note (citing *Allen v. Perini*, 424 F.2d 134, 141 (1970)). Thus, the court fulfills the purpose of Rule 4 by dismissing any frivolous or facially invalid petitions prior to ordering a responsive pleading. Allowing *sua sponte* dismissals after an answer has been filed would undermine the very purpose of burdening a respondent with the filing of an answer.[20]

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[19]. Nor is the language in Rule 4 allowing the court to "take other action the judge may order" intended to grant district courts the power to dismiss *sua sponte* after an answer. Rather, this provision is "designed to afford the judge flexibility in a case where *either dismissal or an order to answer may be inappropriate.*" Rule 4 advisory committee's note (emphasis added). The Advisory Committee Notes make clear that "other action[s]" are those that "may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition," or those actions that might clarify or narrow a petition *prior* to an answer being filed. *Id.*

[20] Certain circuit courts have adopted this interpretation of Rule 4 and AEDPA's statute of limitations provision, holding that the statute of limitations is an affirmative defense that is waived in a habeas case if it is not raised in the first responsive pleading, and that Rule 4 does not allow a court to cure the waiver *sua sponte* after the responsive pleading has been filed. *Nardi*, 354 F.3d at 1140, 1141-42; *Scott v. Collins*, 286 F.3d at 927, 930.

CONCLUSION

For all of the reasons set forth above, *Amici* respectfully request that the Court grant Mr. Day's petition for a writ of certiorari.

Respectfully submitted,

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